DOWER IN MORTGAGED PROPERTY.—The rights of a mortgagor's wife in the mortgaged premises depend both upon the nature and incidents of her inchoate right of dower and upon the time when and the circumstances under which the mortgage was given. Thus, while an incumbrance created after marriage by the husband alone in no way affects the wife's rights, the execution of a mortgage before marriage or even after marriage, if intended to secure the purchase price of the land, results, notwithstanding the absence of a release on the part of the wife, in subordinating her dower to the rights of the mortgagee. Even in this event, however, she still possesses an inchoate right of dower in the equitable estate remaining in the mortgagor. This right until defeated by foreclosure or released, entitles her not only to redeem the premises on her own account and to hold them until compensated for her outlay,[1] but also to recover her dower from anyone who, having an interest in the land by the husband's sole assignment of the equity of redemption or otherwise, has redeemed in his own right.[2]

When, as in loan mortgages, the superiority of the mortgage lien is dependent wholly upon the release of dower by the wife, her interest in the mortgagor's equity of redemption is not necessarily the full measure of her rights. It is well settled that in such a case the wife's inchoate right revives *ipso facto* upon the performance of the condition of the mortgage by the husband or by another in his behalf.[3] The sound rule would therefore seem to be that the release of the dower right is not, as is sometimes held, absolute, but, like the conveyance of the mortgagor, conditional only, and that the wife, being still interested in the estate conveyed, may redeem not only because of her contingent dower in the equity of redemption, but also by virtue of the conditional nature of the release of her inchoate right in the legal estate.[4] It follows that, even in those jurisdictions where the equity of redemption is still regarded as a purely equitable estate, dower in which may be completely barred at any time during the husband's life by his sole deed,[5] such an act, though defeating her rights as against the assignee of the equitable estate, leaves nevertheless intact the right, springing from the conditional release, to redeem from the mortgagee.[6]

After foreclosure, however, all outstanding rights of redemption, whatever their origin, are extinguished and the interests of the wife are, like those of the husband, transferred from the land to the surplus proceeds of the sale. This surplus is, as in analogous cases of equitable conversion, almost universally regarded as land and subject there-

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[1]See Mackenna *v.* Fidelity Trust Co. (N. Y. 1906) 3 L. R. A. [N. S.] 1068 and note; Davis *v.* Wetherell (Mass. 1866) 13 Allen 60; Gatewood *v.* Gatewood (1881) 75 Va. 407; Smith *v.* Hall (N. H. 1892) 30 Atl. 409; Atwood *v.* Arnold (1902) 23 R. I. 609; Hays *v.* Cretin (1906) 102 Md. 695.

[2]Hitchcock *v.* Harrington (N. Y. 1810) 6 Johns. 290; Everson *v.* M'Mullen (1889) 113 N. Y. 293; Collins *v.* Torry (N. Y. 1810) 7 Johns. 278; Swaine *v.* Perine (N. Y. 1821) 5 Johns. Ch. 482.

[3]Hastings *v.* Stevens (1854) 29 N. H. 564; Mathewson *v.* Smith (1835) 1 R. I. 22; Peckham *v.* Hadwen (1865) 8 R. I. 160; and see Rossiter *v.* Cossit (1844) 15 N. H. 38.

[4]McArthur *v.* Franklin (1864) 15 Ohio St. 485.

[5]Jaquess *v.* Board of Com'rs (Ohio 1856) 1 Disney 121.

[6]See Bank of Commerce *v.* Owens (1869) 31 Md. 320.

fore to the wife's right of dower.[7] The desire to safeguard still further the interests of the wife, has, however, led the courts of other jurisdictions to adopt, in certain cases, a more favorable rule of apportionment, by which she is held entitled to receive out of the surplus the full value of her original dower in the entire fee. To sustain this result two doctrines have been invoked. In some States the rule is apparently founded on the early common law duty of the husband to exonerate his wife's dower by paying off outstanding incumbrances on the land.[8] In others it is derived from the well settled principle that a wife, having mortgaged her separate property for her husband's debt, is entitled as against him to the rights of a surety,[9] and from the proposition that in joining in the mortgage the wife consents to release her dower only if her husband's incumbered interest is insufficient to pay the debt.[10]

This rule of apportionment has, however, been rejected by most courts. The principle of exoneration is in these States held unsuited to the conditions of this country,[11] while the theory of suretyship is attacked on the ground that the inchoate right is a mere expectancy incapable of being pledged or mortgaged and that therefore the release of this right cannot be considered as a pledge of the wife's separate property for her husband's debt.[12] The fact that the widow is in most American jurisdictions entitled to a distributive share of her deceased husband's personal property lends force to the first objection. The argument adduced against the doctrine of suretyship is not, however, entirely convincing. Although the inchoate right of dower is still regarded by many courts as a mere contingent chose in action,[13] it is by others considered an interest in the land itself.[14] Even the most conservative jurisdictions have conceded that it possesses many of the attributes of property, which entitle it to equitable protection.[15] There would seem, therefore, to be no principle concerning the nature of the inchoate right necessarily repugnant to the view that it may be pledged together

[7]Denton *v.* Nanny (N. Y. 1850) 8 Barb. 618; Matthews *v.* Duryee (N. Y. 1868) 4 Keyes 525; Cornog *v.* Cornog (1869) 3 Del. Ch. 407; Keith *v.* Trapier (S. C. 1830) 1 Bailey Eq. 63. A few jurisdictions, apparently following the principle that the wife's release of dower is absolute, hold the husband exclusively entitled to this surplus. Newhall *v.* Lynn Bank (1869) 101 Mass. 428; Kauffman *v.* Peacock (1885) 115 Ill. 212.

[8]Wilson *v.* McConnell (S. C. 1857) 9 Rich. Eq. 500; Henagan *v.* Harllee (S. C. 1855) 10 Rich. Eq. 285; Sparrow *v.* Kelso (1883) 92 Ind. 514; McCord *v.* Wright (1884) 97 Ind. 34.

[9]Neimcewicz *v.* Gahn (N. Y. 1832) 3 Paige 614; Vartie *v.* Underwood (N. Y. 1854) 18 Barb. 561; Erie Co. Bank *v.* Roop (1880) 80 N. Y. 591.

[10]Mandel *v.* McClave (1889) 46 Ohio St. 407; Kling *v.* Ballentine (1883) 40 Ohio St. 391; Gore *v.* Townsend (N. C. 1890) 8 L. R. A. 443; Swathmey *v.* Pearce (1876) 74 N. C. 398.

[11]Scott *v.* Hancock (1816) 13 Mass. 162.

[12]Hawley *v.* Bradford (N. Y. 1841) 9 Paige 200; Burnet *v.* Burnet (1889) 46 N. J. Eq. 144; Hoy *v.* Varner (1902) 100 Va. 600.

[13]See Witthaus *v.* Schack (1887) 105 N. Y. 332.

[14]Jewett *v.* Feldheiser (1903) 68 Ohio 523; see Ohio Farmers' Ins. Co. *v.* Bevis (1897) 18 Ind. App. 17.

[15]Simar *v.* Canaday (1873) 53 N. Y. 298; Buzick *v.* Buzick (1876) 44 Iowa 259; Strayer *v.* Long (1890) 86 Va. 557; see *In re* Alexander (1874) 53 N. J. Eq. 96.

with the mortgaged property. While, moreover, it is unquestionably arguable that in joining in the mortgage the wife does not, as when she mortgages her separate property, intend to acquire the rights of a surety,[16] the courts have not regarded the presence of such actual intention as a prerequisite to the right of subrogation.

It is to be noted, however, that the scope of the applicability of the general rule under consideration will of necessity vary acccording to the theory adopted in its support. While the theory of exoneration is equally applicable to all classes of mortgages, the doctrine of subrogation is, on principle, limited to loan mortgages, for it is with respect to these alone that the wife is a necessary party to the transaction by which her rights are subordinated to the mortgage lien. Thus, in the recent case, *In re Hays* (1910) 181 Fed. 674, the court being called upon to direct the disposition of the proceeds of a purchase money mortgage according to the Ohio law, correctly held that the theory of suretyship recognized in that State could not be invoked to secure to the wife more than that share of the surplus representing her inchoate dower in the equity of redemption.

THE RECOVERY OF INTEREST AS DAMAGES IN CONTRACT ACTIONS.—Whereas the interest accruing on an obligation before its maturity is recoverable only by virtue of a contract express or implied stipulating therefor, that which is allowed after maturity is awarded purely as damages for the wrongful detention of the debt.[1] In determining the amount of recovery in such cases, the fundamental principle is that the plaintiff should be fully compensated for the loss that he has sustained. The law, however, places upon him the obligation to take reasonable steps to render his injury as small as possible.[2] Consequently, just as the vendee on breach of a contract of sale is under a duty to purchase the goods in the open market and charge the vendor with the difference between the contract and the market price,[3] so on failure to satisfy an obligation to pay money the plaintiff is under a similar duty to borrow a like sum and charge the defendant with the amount necessarily expended for that purpose.[4] Since it is to be presumed that the injured party would be obliged to pay the legal rate for the money thus obtained, interest computed on this basis affords him just compensation for his loss. Thus it is evident that the award of interest as damages is not in any sense dependent upon the existence of a contract between the parties providing therefor.[5] In fact it is immaterial whether or not the obligation itself bears interest, for even if it does, the contract rate prevails only to the date of maturity, whereas

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[16]See Durnherr *v.* Rau (1892) 135 N. Y. 219.

[1]Sedgwick, Damages § 282; Sutherland, Damages § 300; Loudon *v.* Taxing District (1881) 104 U. S. 771; Brainard *v.* Jones (1858) 18 N. Y. 35; O'Brien *v.* Young (1884) 95 N. Y. 428, 435.

[2]Miller *v.* Mariner's Church (Me. 1838) 7 Greenl. 51. See 10 COLUMBIA LAW REVIEW 754.

[3]Rochester Lantern Co. *v.* S. & P. Press Co. (1892) 135 N. Y. 209.

[4]See Sutherland, Damages § 76; Loudon *v.* Taxing District *supra;* O'Brien *v.* Young *supra.*

[5]Some cases, however, base the award of interest on a contract implied in law. Reid *v.* Rensselaer Glass Factory (N. Y. 1824) 3 Cow. 393; Perry *v.* Taylor (1871) 1 Utah 63.